Supreme Court of the United States

OCTOBER TERM, 1960

No. .....

CHISHOLM-MOORE HOIST CORPORATION,

Petitioner,

against

WILLIAM CARLSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Chisholm-Moore Hoist Corporation, prays that a writ of certiorari be issued to review a judgment of the Court of Appeals for the Second Circuit entered in the above cause on July 19, 1960, affirming a judgment of the United States District Court for the Southern District of New York, which awarded the plaintiff the sum of $50,000.00 as damages for personal injuries.

The Opinions of the Courts Below

There was no opinion written by the trial court. The opinion of the Court of Appeals, Appendix A of this petition, is not yet officially reported.

Jurisdiction

The jurisdiction of this court is invoked pursuant to the provisions of Title 28, U. S. C. A., Section 1254 (1).

The judgment of the Court of Appeals for the Second Circuit, affirming the judgment of the District Court, was entered on July 19, 1960. That judgment is contained in Appendix B hereof.

Questions Presented

1. Did the Court err in admitting material evidence which was clearly inadmissible under the rules of evidence of the State of New York, and which was not rendered admissible by any statute of the United States or under any rule of evidence applied in the Courts of the United States in equity trials?

2. Is the evidence of an expert that his inspection of a mechanical device disclosed that it was fabricated from inferior metal admissible to prove that a similar device was defective without evidence to show that both were fabricated from the same or substantially the same metal?

Statutes Involved

Federal Rules of Civil Procedure, 43(a), 28 U. S. C. A., provides:

> "In all trials, the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute

or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner."

Statement of the Case

The plaintiff sued in negligence to recover damages for personal injuries suffered when a heavy metal piston, which was being lowered by a hand hoist manufactured by the defendant and sold to the plaintiff's employer, dropped suddenly and crushed his fingers. His proof was directed to establishing that the manufacturer was negligent either in assembling the hoist because it failed to tighten a nut at the end of the central shaft of the hoist, or in the manufacture of the ratchet and pawl device which was an integral part of the braking system of the hoist, in that it was made from defective materials.

The accident happened in Houston, Texas. The plaintiff is a citizen of that State. The defendant is a New York corporation. Jurisdiction was based on diversity of citizenship.

The plaintiff, a millwright employed by the Austin Company in Houston, was injured on the morning of April 20, 1950, when a heavy piston which he was assisting in installing in a machine press, dropped suddenly and crushed his fingers. The piston was heavy, weighing about 2,200 pounds, and was being lowered into position by means of a hand hoist, which was swung over the hook of a heavy overhead crane. The hand hoist was used for the purpose of securing accuracy in placing the piston (12a). The overhead crane and the hand hoist were each being operated by, and were under the control of, co-employees of the plaintiff.

The hand hoist, as is pointed out in the opinion of the Court of Appeals, is a simple mechanism, operating on the principle of the lever. An external wheel, which is rotated by pulling on a chain, turns a set of gears which turns another wheel to which the load is attached by another chain. The load is raised by pulling the hand chain in one direction, and lowered by pulling it in the other. On the upward movement, the load is prevented from reversing its direction by means of a ratchet and pawl mechanism; at the top of each upward pull, the pawl or metal tongue drops in between the teeth of the ratchet and holds the load stationary (16a). To prevent the load from falling on the downward pull, there is a braking mechanism consisting of a friction disc which is attached to the hand wheel and a stationary friction disc. The weight of the load forces the friction disc on the hand wheel against the other friction disc and prevents the load from falling (17a).

The manner in which the accident happened was described by a co-employee of the plaintiff, Vernon A. Merriman, who was acting as signal man during the operation of placing the piston. His testimony was that the hand hoist which the workmen were using had just been taken from a new crate (13a). It was hung on the hook of the overhead crane, centered over the piston and hooked into the eye bolt which had been inserted in the head of the piston (14a). The piston was then resting on straps which had been bolted underneath to hold it into position. The operator of the hand hoist "took a strain on the piston", transferring the weight on the piston from the straps to the hoist, so that the straps could be removed and the piston lowered. On a signal from the witness, the operator pulled on the chain to lower the load and the piston dropped suddenly to the table below, crushing the plaintiff's fingers (14a).

For the purposes of this petition it may be conceded that from the evidence in the plaintiff's case the jury

could infer that there was no motion of the overhead crane immediately before the piston dropped; that if the brake mechanism of the hand hoist was functioning properly the sudden drop of the piston would not have occurred; and that the operator of the hand hoist could not have caused the sudden drop by manipulation of the hand chain. Had the defendant been in control of the machine, the evidence may well have been sufficient to take the case to the jury under the rule of *res ipsa loquitur*. Since the defendant had sold the machine, and parted with possession of it, at some undetermined time before the accident, and was not in control of the machine when the accident happened, it was necessary for the plaintiff to establish by competent testimony that the accident was due to a defect in the machine for which the defendant was responsible.

To satisfy this requirement the plaintiff submitted testimony directed to establishing two entirely different possible defects for the existence of which the jury might find that the defendant was responsible. One would have pointed to negligence in the assembly of the machine, and the other to negligence in the choice of materials from which the ratchet and pawl were made or in failure properly to inspect those materials. Neither is related to the other and the very fact that both theories were put forward sufficiently indicates their speculative nature.

The witness Merriman, after having testified to the manner in which the accident happened and having explained the manner in which the machine functioned, was asked the following question: "Mr. Merriman, based on your experience over thirty-two years with hundreds of hoists, and based upon what you saw, both at the time of the accident and after the accident, can you give us an opinion as to what caused the accident itself?" The question was objected to and the objection was overruled. The witness answered: "In my opinion if this nut had been loose on the chain wheel, and the hoist had been slacked

in, the two friction discs would not hold the full capacity of this load. It would slip. It would turn loose." Counsel for the defendant moved to strike the answer but his motion was denied (18a, 19a).

The expert Isaac Stewart had examined a similar hoist which concededly was not the hoist involved in the accident (24a). He testified that he observed that the pawl would occasionally become hung up on top of a tooth of the ratchet, and not sink into the root of the teeth as it was designed to do. This, if it happened, could account for the sudden drop of the piston (26a). He testified that the condition which he found was dependent upon the "fabrication of the pawl and the fabrication of the ratchet wheel, the question of the heat treatment of the two metals because of the fact that you have two hard surfaces in contact with each other, and also the manufacturing techniques used in the plant to produce it" (27a). He conceded that the device itself was standard in all hoists (31a). It had been in use for longer than he had been around (32a).

REASONS FOR GRANTING THE WRIT

1. The expert's testimony as to the cause of the occurrence was not admissible under Rule 43(a) of the Rules of Civil Procedure. Since it was determinative of the outcome of the case, its admission deprived the defendant of a fair trial.

The difficulties and uncertainties involved in the application of the standards of admission set up under Rule 43(a) of the Rules of Civil Procedure are well recognized. They are even more acute in diversity cases than in federal question cases, since evidence that would be excluded if the case were tried in the state court may be the only evidence upon which a judgment in the federal court is sustainable.

The standards of admission established by the rule seem to be very simple. Evidence is admissible in the federal courts if it is admissible under state law, federal statute, or federal equity practice. The uncertainty arises where there is no applicable statute and no precedent from equity practice, and when the evidence is not admissible under state rules. May the court then use other authorities to admit the testimony or must it exclude it because exclusion is required under the state rules? The question was raised but not answered in Judge Waterman's opinion in *Cereste* v. *New York, New Haven & Hartford R. Co.*, 231 F. 2d 50, 57, when he wrote:

> "It may be that Rule 43(a) of the F. R. C. P., 28 U. S. C. A. requires us to search out and apply the applicable state rule of evidence here—absent a more lenient rule proscribed by a United States statute or derived from federal equity suits before the adoption of federal rules. See *Schillie* v. *Atchison, T. & S. F. R. Co.*, 8 Cir., 1955, 222 F. 2d 810. I am not certain either that Rule 43(a) completely eliminates any creative power on our part to modify rules of evidence applicable in federal courts or that it would be erroneous for us to draw evidence rules from actions at law in the federal courts before the adoption of the federal rules."

The same problem was discussed by Judge Collet of the Eighth Circuit in his opinion in *Schillie* v. *Atchison, Topeka & Santa Fe Railroad Co.*, 222 F. 2d 810, 818.

The consensus of opinion seems to be that in such circumstances, where there is no applicable statute and no relevant federal equity precedent, the state rule must be applied. (*Palmer* v. *Fisher*, 228 F. 2d 603, cert. denied 351 U. S. 965; *Conn* v. *Young*, 267 F. 2d 725; *Rona* v. *Adam Scheidt Brewing Co.*, 197 F. 2d 614.)

In this case, the question asked of Mr. Merriman was clearly objectionable under the law of the State of New York and the opinion of the Court of Appeals below seems to agree that, if the case were tried in the state court, the objection would have been sustained. (*Dougherty v. Milliken*, 163 N. Y. 527; *Welle v. Celluloid Co.*, 106 N. Y. 219; *Clark v. Iceland S.S. Co.*, 6 A. D. 2d 544; *Blind v. Rochester Aeronautical Corp.*, 273 App. Div. 1056.)

The Court of Appeals justifies the admission of the testimony, and the allowance of the question, on the authority of an old admiralty decision. (*Transportation Line v. Hope*, 95 U. S. 297.) Assuming that the authority cited, if it could be restorted to, would be controlling, it is respectfully submitted that the Court did not have the right or the power to go beyond the rule in allowing testimony which is banned by the rules of the state in which the case is being tried.

In view of the diversity of opinion in the several Circuits as to the right or power of the court to go outside the provisions of Rule 43(a) in finding a basis for the admission of testimony, it is respectfully submitted that the problem merits consideration by this Court.

There was equally serious error in the acceptance of the expert's testimony as to the defects which he found in the particular ratchet and pawl which he examined. Concededly, he was not examining the machine that was involved in the accident, but a substantially similar machine. The expert did not find any defect in any aspect of the machine as to which there was evidence of substantial similarity with the machine involved in the accident. What he did find, and the Court so explained it to the jury (123a), was that there was some defect, which he did not explain in any detail, in the materials from which the ratchet and pawl he examined were fabricated. There was no evidence that the material in the ratchet and pawl involved in the accident was substantially the same as that

in the hoist which the expert examined. No inference, therefore, could be drawn from that expert's testimony as to the condition of the material of the offending hoist. The very basis of any such inference is the similarity of condition. (*Shanahan* v. *Southern Pacific Co.*, 188 F. 2d 564.)

Conclusion

The interpretation of Rule 43(a) of the Rules of Civil Procedure by the Court of Appeals here is at variance with the opinions expressed by several of the other Circuits in the United States. The question involved is one of vital interest to every litigant in the federal courts. It is of even greater interest to the increasing number of litigants involved in causes which depend for their determination on opinions of experts. It is a matter which not only merits, but requires, an authoritative resolution by this Court. It is respectfully submitted that the petition for the writ of certiorari should be granted.

Respectfully submitted.

GALLI, TERHUNE, GIBBONS & MCLAUGHLIN,
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PATRICK E. GIBBONS,
Of Counsel.

Appendix A—Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 321—October Term, 1959.

(Argued June 6, 1960 Decided July 19, 1960.)

Docket No. 26013

WILLIAM CARLSON,

Plaintiff-Appellee,

—v.—

CHISHOLM-MOORE HOIST CORPORATION,

Defendant-Appellant.

Before:

LUMBARD, *Chief Judge,*
and CLARK and FRIENDLY, *Circuit Judges.*

Appeal from a judgment of the District Court for the Southern District of New York, Charles M. Metzner, *Judge*, in a personal injury action, entered pursuant to a jury verdict of $50,000 for the plaintiff. Affirmed.

HARVEY GOLDSTEIN (Silas B. Axtell, Goldstein & Sternfeld, and John Gleason on the brief), New York, N. Y., *for Plaintiff-Appellee.*

PATRICK E. GIBBONS (Ralph H. Terhune and Galli, Terhune, Gibbons & Mulvehill on the brief), New York, N. Y., *for Defendant-Appellant.*

Appendix A—Opinion

FRIENDLY, *Circuit Judge:*

This action was brought in the District Court for the Southern District of New York by Carlson, a citizen of Texas, against defendant, a New York corporation, to recover for an injury suffered in Texas and allegedly caused by defendant's negligent manufacture of a chain hoist. The appeal presents questions whether there was sufficient evidence of defendant's negligence to support the jury's verdict for the plaintiff and whether certain testimony offered by plaintiff was properly received. We affirm.

Carlson was employed as a millwright by the Austin Company in Houston. On the morning of April 20, 1950, he was engaged, along with several co-workers, in inserting heavy pistons into the cylinders of a large machine press. Each piston was brought to "working distance" of the press by a large overhead crane. In order to achieve the delicate control over the piston necessary for the final installation, the workers would then attach a chain hoist to the crane. The basic physical principle of the hoist is that of the lever. An external wheel, manipulated by an attached chain, turns a set of gears, which turn another wheel to which the load is attached by another chain. When one pulls on the hand chain so as to cause the hand wheel to move in one direction the load is raised, and in the other direction, lowered. In the so-called one-ton hoist here involved, which in fact is geared to handle loads of 3,000 pounds, the hand chain has to be pulled about three feet to move the load one inch. Unlike a simple block and tackle, the chain hoist also contains a braking device, so that when the operator ceases to pull on the hand chain, the very weight of the load forces a friction disc attached to the hand wheel against another friction disc and prevents further motion of the load.

The piston involved in the accident had a diameter of twelve inches throughout most of its length of 30 to 36

inches and weighed about 2,200 pounds. On the day of the accident twelve similar pistons had been installed by use of a hoist with "a long pull chain." When the time came to install the thirteenth piston, one of Austin's employees removed from a packing crate a new one-ton aluminum hoist manufactured by defendant; this had a shorter chain. The hook at the end of its load chain was affixed to an eyebolt which had been screwed into the head of the piston. Plaintiff's witnesses testified, without contradiction, that chain hoists required no preliminary adjustment or testing and that it was customary to put them to use just as they came from the packing crate.

Carlson was stationed on some scaffolding adjacent to the steel die or table, to which the piston was to be lowered from about twenty inches above. Upon a signal from him and another member of the crew, the hoist operator pulled the hand chain in the down direction for about three feet. At that moment Carlson's hands were resting on the die directly under the piston, he being engaged in wiping some grease and foreign matter from the surface of the die; if the hoist had been working properly, the twenty inch descent would have taken several minutes and Carlson would have had ample time to complete this task. Instead the piston fell the entire twenty inches to the die and landed on plaintiff's left thumb and his right thumb, index finger, and middle finger. All these eventually had to be amputated in major part.

The piston was removed from Carlson's hand by the overhead crane. That this could be done ruled out the possibilities that the accident was caused by some defect in the attachment of the load chain to the piston or in the crane itself. Examination of the hoist revealed that the load chain was entirely paid out; what had fallen was the load chain and the attached load. It was undisputed that if the hoist had been functioning properly, the operator could not have caused the abrupt fall by improper manipulation of the chain.

The record is not altogether clear as to what happened next. Defendant read in evidence a deposition by Green, construction superintendent for the Austin Company, in which Green said that, having first ordered an ambulance from his office, he arrived at the scene of the accident three to five minutes after its occurrence; that the piston was still hooked to the hoist—"Whether the piston was up or down I wouldn't say"; that he operated the hoist to raise and lower the piston, which it did successfully; and that he then had the hoist taken to his office where it remained for three or four days until he sent it out for testing. Plaintiff's witness Merriman, the signalman of the crew, testified that, after having arranged for the crane to remove the piston from Carlson's hands, he ran down to see Carlson, then busied himself looking for the ambulance, and, when he next saw the hoist, 10 or 15 minutes after the accident, found it lying on the ground, disassembled with Cannon, the Austin Company's general foreman, and Griffith, the night foreman, standing over it and with Cannon holding a friction disc. This disc bore some black marks, which Merriman termed "a heat or what we call in our trade a guard mark," caused by "intense friction or heating being applied." Clearly Merriman's and Green's testimony cannot be wholly reconciled.

Having sought to negate all causes of the accident other than a defect in the hoist, plaintiff endeavored to indicate what the defect might have been. Merriman was allowed to testify, over an objection which we will discuss below, that if the elastic nut which held the hand wheel on the central shaft of the hoist were loose, the two friction discs would not hold the full capacity of the load, and that he had seen other hoists in which a cotter pin had been inserted behind the nut to prevent such slippage. Stewart, a consulting engineer, corroborated this. In addition, he had examined the friction discs and found that each showed heavy black circles of resinous material; this, he said, was the result

of the release of a bonding agent induced by heat generated by friction, "a dynamic type of braking operation * * * indicative of the development of a brake fade situation" which would cause slippage. Stewart also advanced an alternative theory. On the basis of examination of the braking mechanism of another hoist of the same model, he concluded there was a possible defect in the ratchet, a circular wheel having teeth, and in the pawl, a tongue-like strip that fitted into the teeth. When the hand wheel was turning in the up direction, he detected a tendency for the tip of the pawl not to slip into one of the teeth but rather to get hung up on the end of the wheel. He said that then the heavy downward pressure of the load would cause the ratchet to reverse itself and begin to move rapidly in the other direction and that the friction discs, designed for static braking, might be insufficient for such a dynamic braking situation.

In addition to the deposition of Green as to his successful operation of the hoist immediately after the accident, defendant's case was as follows: Shilstone, the engineer to whom Green sent the hoist for testing, described extensive operating tests he had made and said that at no time did the hoist malfunction in any degree. Cotesworth, defendant's service manager, testified that the hoist was received back from Texas in December, 1950; that he examined it in April, 1951; that the hoist operated properly; that he opened the hoist and found it "in good condition," although what he called "the washers," which we take to be what other witnesses called the friction discs, "were encrusted with black scale and showed uneven braking surfaces." Defendant sought to counter plaintiff's evidence with respect to the nut by testimony of its chief engineer that if a substantial amount of weight was on the load chain, the hand wheel would be forced against the friction discs regardless of how loose the nut was; this was corroborated by tests run by another engineer in defendant's employ. The chief

engineer also testified that the type of elastic nut which defendant employed was in standard use, and that the small size of the shaft would make it difficult to install a cotter pin of adequate size. The same witness sought to counter Stewart's ratchet and pawl theory on the basis that the ratchet and pawl are part of the operative mechanism only when the load is being raised rather than lowered; however, the witness conceded on cross-examination that safe operation demanded that the ratchet be stationary on the downward pull, although he went on to say that if for some reason the pawl was not inserted in the ratchet at the beginning of the downward operation or had popped out, this still could not account for such malfunctioning as here occurred.

Defendant sought also to explain how the accident could have happened if there had been no defect in the hoist. It suggested that if the fastening at the upper end of the piston was not an eye but a hook (or an eye which had opened so as to be a hook)—a possible, though highly dubious, inference from some language in Merriman's testimony which he later disclaimed—this hook might have become entangled with the slack portion of the load chain, thereby transferring the weight and depriving the braking mechanism of any force, so that the load would drop as soon as the operator released the hand chain. However, cross-examination showed that the physical relationship between the fastening and the slack part of the load chain made such a transference impossible; and defendant has not seriously pressed this point on appeal.

At the end of plaintiff's case defendant moved to dismiss; the judge reserved decision. At the conclusion of the entire case defendant moved for a directed verdict and for dismissal of the negligence count; the judge again reserved decision. Later defendant moved to have the verdict set aside; this the judge denied.

On most matters we must here apply the law of New York, including, of course, its conflict of laws, *Klaxon Co.* v. *Stentor Electric Manufacturing Co., Inc.*, 313 U. S. 487 (1941). New York would look to Texas law for all "substantive" rules. We are not required to decide whether the reference to New York law ought include the quantum of proof required to sustain a jury verdict, see *Dick* v. *New York Life Insurance Co.*, 359 U. S. 437, 444-45 (1959), or, if it ought, whether New York would look to its own rule or that of Texas, see American Law Institute, Restatement of the Conflict of Laws, § 595, comment b; *Clark* v. *Harnischfeger Sales Corp.*, 238 App. Div. 493, 264 N. Y. Supp. 873 (2d Dept. 1933); *Anderson* v. *Material Coordinating Agency, Inc.*, 63 N. Y. S. 2d 324 (Sup. Ct. 1946); *Franklin Sugar Refining Co.* v. *Lipsicz*, 229 App. Div. 160, 165, 221 N. Y. Supp. 11, 15 (4th Dept. 1927), *aff'd* 247 N. Y. 465, 160 N. E. 916 (1928). For the parties have not urged and our own study has not indicated that, in cases like the present, any different test of sufficiency is applied by the Federal courts, the New York courts or the courts of Texas.

Analysis is aided by recognizing that plaintiff had two separate problems of proof. He was obliged to show, *first*, that his injury was caused by a defect in the hoist, and, *second*, that the defect was attributable to defendant's negligence. See the useful discussion in 2 Harper & James, The Law of Torts, §§ 28.12 and 28.14. Clearly plaintiff presented sufficient evidence to meet his burden on the first proposition. "The plaintiff was not required to offer evidence which positively excluded every other possible cause of the accident," *Rosenberg* v. *Schwartz*, 260 N. Y. 162, 166, 183 N. E. 282 (1932), although, in fact, Carlson came close to doing so. If the evidence did not utterly exclude maltreatment of the hoist after it had left defendant's factory, improper fixation of the hoist to the crane, faulty manipulation by the hoist operator, mal-

functioning of the crane, or a defect in the eyebolt or its attachment, there was at least a vast preponderance in plaintiff's favor. To be sure, there was also the testimony of Green, Shilstone and Cotesworth as to the proper functioning of the hoist after the accident. However, the jury was not required to believe Green, whose testimony was inconsistent with Merriman's in some respects and whose story that he then and there manipulated a heavy piston with a hoist that had just given way might well have seemed improbable; the value of Shilstone's tests was impaired by Merriman's testimony that the hoist had been disassembled and, presumably, reassembled on the spot, so that a defect in assembly might have been cured; and Cotesworth's inspection, nine months after the event, was still less conclusive.

Plaintiff's success in overcoming the first hurdle does not relieve him of the need of surmounting the second, although it may help him as we shall see. On the second proposition, plaintiff's evidence was admittedly meagre; indeed, defendant says it was non-existent. Plaintiff says it sufficed to meet the limited requirements made of him, citing *Trowbridge* v. *Abrasive Co. of Philadelphia*, 190 F. 2d 825 (3d Cir. 1951), and *Markel* v. *Spencer*, 5 App. Div. 2d 400, 171 N. Y. S. 2d 770 (4th Dept. 1958) aff'd without opinion, 5 N. Y. 2d 958, 157 N. E. 2d 713 (1959).[1] Defendant seeks to distinguish these cases on the basis that in both the defect had been particularized, disintegration of an abrasive wheel in one case and shattering of a bolt in an automobile brake in the other, whereas here there was no clear proof of any specific defect in its hoist—there being no direct evidence that the nut on this hoist was loose or the ratchet and pawl defective, in addition to defend-

[1] Plaintiff also cites *Swenson* v. *New York, Albany Despatch Co.*, 309 N. Y. 497, 131 N. E. 2d 902 (1956); but we do not find that decision, dealing with a reconditioner, of much aid.

ant's claim that these could not have caused the accident in any event.

Defendant's attempted distinction would elevate an element of proof into a principle of law. To be sure, in many cases pinpointing the defect will make it easier for a plaintiff to adduce other evidence to support a finding of negligence in manufacture, as in the *Abrasive Co.* case, which is indeed distinguishable on the existence of more impressive expert testimony of this sort. On the other hand, it is hard to see how the evidence as to the shattering of the bolt in the automobile brake in *Markel* took the plaintiff very far down the road—if such an expression is permissible on the facts there—since plaintiff offered no proof that what caused the shattering was due to defect in design or in the selection of materials or was within defendant's power to detect by any reasonable means of inspection, and the court added that "even if it were found that the defendant had purchased the bolt from others, the inference of negligence on its part was nevertheless a permissible one." It has been said, 2 Harper & James, The Law of Torts, p. 1568, that "Where there is no evidence of a specific defect, dangerous and unusual performance by an article subjected to ordinary use is sometimes held to warrant an inference of the maker's negligence as well as of a defect, if other likely explanations of the mishap are ruled out by a preponderance of the evidence." For this the authors cite, in addition to a line of "bursting bottle" cases, *Trowbridge* v. *Abrasive Co.*, *supra*; *Lindroth* v. *Walgreen Co.*, 407 Ill. 121, 94 N. E. 2d 847 (1950); and *Carter* v. *Yardley & Co.*, 319 Mass. 92, 64 N. E. 2d 693 (1946). The *Abrasive Co.* case hardly supports this for the reason pointed out above; and in the *Yardley* case the evidence of negligence went somewhat beyond the mere fact of injury to the plaintiff and the question mainly preoccupying the Supreme Judicial Court was its important decision that *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382, 111 N. E.

1050 (1916), had "caused the exception to swallow the asserted general rule of nonliability" of manufacturers to persons not in privity of contract with them. However, *Lindroth* and the bursting bottle cases support the quoted proposition, as does *Markel* v. *Spencer*, *supra*, and the law seems to be moving that way. Here we do not have to go quite so far in order to sustain the verdict. Plaintiff demonstrated that undue friction and consequent slippage had occurred within the hoist and suggested two possible reasons why—slippage of the nut, permitting an inference that this had been ill designed or installed, and defect in the ratchet and pawl, permitting an inference of negligence in design, choice of materials or inspection; and the jury could properly have believed plaintiff's rather than defendant's witnesses as to the causal relation of these alleged defects to the accident.

It remains to consider defendant's points as to the admission of certain testimony. Merriman was asked his opinion as to the cause of the accident, and over the defendant's objection, gave the following answer:

> "In my opinion if this nut had been loose on the chain wheel, and this hoist had slacked in, the two friction discs would not hold the full capacity of this load. It would slip. It would turn loose."

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[2] The authors shrewdly suggest, p. 1508, fn. 27, that these decisions may amount to an unstated application of *res ipsa loquitur*; unstated because it offends Chief Justice Erle's mandate, *Scott* v. *London & St. K. Docks Co.*, 3 H. & C. 596, 601, 159 Eng. Rep. 665 (1865), that "the thing" must be "shown to be under the management of the defendant and his servants" at the time of the injury, but nevertheless sound once plaintiff has established that the defect must have existed when "the thing" left defendant's control. See also § 19.7, pp. 1085 ff.; *Penkeidorfer* v. *Garrett*, 143 S. W. 2d 1020 (Tex. Civ. App. 1940); *Honea* v. *Coca-Cola Bottling Co.*, 143 Tex. 672, 183 S. W. 2d 968 (1944).

Defense counsel moved to strike the answer; the motion was denied. Then the witness was asked, "In your opinion, Mr. Merriman, was that nut loose at the time of the accident"; defense counsel objected to the question as speculative and the objective was sustained. Insofar as defendant's objection and motion to strike were based on a theory that the testimony was irrelevant in the absence of evidence that the nut in fact was loose, they were properly overruled; particularly when a plaintiff is claiming a defect in an article manufactured by defendant and under defendant's control at the time of trial, plaintiff may show possible as well as actual defects. However, this does not end the matter, for defendant cites New York decisions strictly limiting expert witnesses in expressing opinions regarding the causes of accidents. An example is *Dougherty* v. *Milliken*, 163 N. Y. 527, 57 N. E. 757 (1900), where it was held to be reversible error for the trial court to permit answer to a hypothetical question regarding the safety of a certain construction used to anchor two derricks; the plaintiff's theory of the case was that the defendant was negligent in using that construction, and the court held that expert opinion on the very question the jury had to resolve impinged on the jury's prerogatives. *Accord*, *Wolz* v. *Commercial Travelers Mutual Accident Assn.*, 266 App. Div. 668, 40 N. Y. S. 2d 128 (2d Dept. 1943); *Blind* v. *Rochester Aeronautical Corp.*, 273 App. Div. 1056, 79 N. Y. S. 2d 799 (4th Dept. 1948). Although earlier New York cases, not overruled or criticized, *Van Wyckler* v. *City of Brooklyn*, 118 N. Y. 424, 429 (1890), and *Littlejohn* v. *Shaw*, 159 N. Y. 188, 193 (1899), both citing *Transportation Line* v. *Hope*, *infra*, seem to have looked the other way, we need not explore the New York law in detail, for the testimony was admissible in the District Court under the second clause of Fed. R. Civ. Proc. 43 (a) which provides:

> "All evidence shall be admitted which is admissible under the statutes of the United States, or under the

rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held."

See *Phelan* v. *Middle States Oil Co.*, 220 F. 2d 593, 605 (2d Cir.), *cert. denied*, 349 U. S. 929.

An 1877 decision of the Supreme Court in admiralty, *Transportation Line* v. *Hope*, 95 U. S. 297, firmly rejected the view that experts may not express an opinion on the ultimate issue for the jury. The Court held that an expert in navigation might testify whether it was "safe or prudent" to tow boats in a particular way. While the rule of *Transportation Line* v. *Hope*, was frequently applied in the Federal courts prior to the adoption of the Federal rules, see, e.g., *Fireman's Ins. Co.* v. *J. H. Mohlman Co.*, 91 Fed. 85 (2d Cir. 1898); *Western Coal & Mining Co.* v. *Berberich*, 94 Fed. 329 (8th Cir. 1899); cf. *United States* v. *Spaulding*, 293 U. S. 498, 506 (1935); we have not found any decision of a Federal equity court on the point. However, in view of the Supreme Court's long standing adherence to the *Transportation Line* decision, we think this is a case for assuming, in accord either with the maxim, *aequitas sequitur legem*, or with just ordinary good sense, see Green, *The Admissibility of Evidence Under the Federal Rules*, 55 Harv. L. Rev. 197, 201-02 (1941), that a well established Federal rule of evidence was applied on the equity side as well as on the law side even though no equity decision so declares. See also, Wigmore, Evidence, 3d ed., §§ 1920 and 1921, condemning the exclusionary rule.

Defendant also contends that Stewart should not have been permitted to testify on his "ratchet and pawl" theory since this was derived from examination of a Chisholm-Moore hoist other than the one involved in the accident. The plaintiff denies an intention to allege that any par-

ticular ratchet and pawl was defective; however, the district judge seemed to have received a different impression, for in his summary of the evidence, he referred to the plaintiff's contention "that the materials of the pawl mechanism were defective." Perhaps the difference is only semantic. Stewart was testifying that in a similar hoist he had found a ratchet and pawl which, in his view, did not function properly; from this the jury could infer that the same malfunctioning occurred in the accused hoist. We see nothing wrong in this; Stewart's testimony would have been entitled to more weight if he had found malfunction in the hoist that failed, but the testimony was not inadmissible because he had found the defect only in another of defendant's hoists of similar design. See *Lever Bros. Co.* v. *Atlas Assurance Co.*, 131 F. 2d 770, 777 (7th Cir. 1942).

Judgment affirmed.

Appendix B—Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of July one thousand nine hundred and sixty.

Present: HON. J. EDWARD LUMBARD, Chief Judge,
HON. CHARLES E. CLARK,
HON. HENRY J. FRIENDLY,
Circuit Judges.

WILLIAM F. CARLSON,
Plaintiff-Appellee,

v.

CHRISHOLM-MOORE HOIST CORPORATION,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

B.

NIALL F. O'DOHERTY,
Deputy Chief Clerk.